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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re ROBERT HENRY
on Habeas Corpus.

A150637
(Solano County
Super. Ct. No. VC19726)

More than 30 years ago, defendant was convicted of murder with a special circumstances allegation and sentenced to a term of life in prison without possibility of parole (LWOP). In March 2016, the trial court denied a petition filed by defendant that sought resentencing on the ground that the imposition of the LWOP sentence, without individual consideration of his age-related characteristics, violated the Eighth Amendment prohibition on cruel and unusual punishment. We find no error in the denial of defendant's petition because defendant was 19 years old when he committed his crime.

Factual and Procedural Background

In March 2016, defendant filed a pro se petition for recall of sentence under Penal Code section 1170, subdivision (d)(2).¹ Defendant's petition acknowledged that he was 19 years old at the time the crime was committed. He argued, however, that under the

¹ Penal Code section 1170, subdivision (d)(2) provides, with certain exceptions: "When a defendant who was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment for life without the possibility of parole has been incarcerated for at least 15 years, the defendant may submit to the sentencing court a petition for recall and resentencing. . . ."

All further statutory references are to the Penal Code.

rationale of *Miller v. Alabama* (2012) 567 U.S. 460 (*Miller*)² and its progeny, he was entitled to be resentenced because, like a juvenile offender, as a young adult he also was entitled to individualized consideration under the Eighth Amendment.

On February 10, 2017, after appointing counsel for defendant and requesting additional briefing by the parties, the trial court denied defendant's petition. The court explained, "I'm not make any ruling on the merits of the underlying substance of whether or not he has earned relief. Based upon his unique circumstances, it seems to me that the only mechanism under which I could resentence him would be pursuant to *Miller* . . . analysis, which does basically authorize such actions for minors. In this case the defendant is not a minor. . . . [¶] So, based on the specific procedural posture, I'm going to deny his request." Defendant timely filed a notice of appeal.

Discussion

The Attorney General contends that the trial court had no jurisdiction to consider defendant's petition and that a defendant seeking to challenge his sentence long after he has been convicted and started serving his sentence must seek relief via a petition for writ of habeas corpus. On the merits, the Attorney General argues that imposition of a LWOP sentence on a defendant who was 19 at the time of the crime does not violate the Eighth Amendment.

As a procedural matter, we agree that because defendant was not under the age of 18 at the time he committed his crime, his petition was not authorized under section 1170, subdivision (d)(2). The Attorney General is correct that the proper mechanism for challenging a sentence based on a claim of constitutional error in this circumstance is via a petition for writ of habeas corpus. (*In re Kirchner* (2017) 2 Cal.5th 1040, 1052-1053.)

² In *Miller*, the court held that because juveniles have "distinctive (and transitory) mental traits and environmental vulnerabilities," the Eighth Amendment "forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." (*Miller, supra*, 567 U.S. at pp. 473, 479.) The court recognized, however, that a trial court could in its discretion impose such a sentence after considering "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Id.* at p. 480.)

Because defendant filed an improper petition for resentencing, the court correctly denied the petition. The denial of the invalid petition is not an appealable order as it is neither (1) a “final judgment of conviction” nor (2) an order made after judgment which affects the “substantial rights of the party.” (§ 1237; see *People v. Chlad* (1992) 6 Cal.App.4th 1719, 1725 [defendant’s substantial rights not affected by trial court’s denial of untimely motion to recall sentence under § 1170, subd. (d)(1)].) While the court might have deemed his petition a petition for writ of habeas corpus, the denial of a petition for habeas corpus is also not an appealable order. The remedy is to file a new habeas petition in the appellate court. (*In re Clark* (1993) 5 Cal.4th 750, 767, fn. 7.) Anticipating this issue, defendant requests that we treat his appeal as a petition for writ of habeas corpus and resolve the matter on the merits. In the interests of resolving the matter in a timely manner, we adopt this course of action and address the matter on the merits.

Because defendant was 19 years old when he committed his crime, the rationale applicable to the sentencing of juveniles in *Miller* and other cases relied upon by defendant does not apply. (*People v. Argeta* (2012) 210 Cal.App.4th 1478, 1482 [rationale of *Miller* does not extend to defendant, who was just over 18 years old at the time of his offenses]; see also *People v. Perez* (2016) 3 Cal.App.5th 612, 617 [agreeing with *Argeta* and declining defendant’s “invitation to conclude new insights and societal understandings about the juvenile brain require us to conclude the bright line of 18 years old in the criminal sentencing context is unconstitutional”].) While an argument can be made based on the Supreme Court’s observation in *Roper v. Simmons* (2005) 543 U.S. 551, 574 that “[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18,” the court in that case also clearly stated that “a line must be drawn” and “18 is the point where society draws the line for many purposes between childhood and adulthood.” Until the United States Supreme Court or the California Supreme Court directs otherwise, we are bound by the line previously drawn for Eighth Amendment purposes at age 18. (*People v. Fletcher* (1996) 13 Cal.4th 451, 469, fn. 6; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, we

must hold that defendant's sentence does not violate the Eighth Amendment's proscription against cruel and unusual punishment.

Defendant has not raised any argument regarding relief under the youthful offender statute. (See § 3051 [requiring that a “youth offender parole hearing” be held after specified years of incarceration “for the purpose of reviewing the parole suitability of any prisoner who was 25 years of age or younger . . . at the time of his or her controlling offense”].) Although the statute extends the availability of relief to an offender who was 25 years of age or younger at the time of the controlling offense, by its own terms, the statute does not apply to offenders, like defendant, who were sentenced to life without the possibility for parole for an offense that was committed after they turned 18 years old. (§ 3051, subd. (h) [“This section shall not apply . . . to cases in which an individual is sentenced to life in prison without the possibility of parole for a controlling offense that was committed after the person had attained 18 years of age.”].) Defendant has not argued, and we express no opinion, whether the exclusion of certain offenders from relief under the statute violates a defendant's right to equal protection under the Fourteenth Amendment. (See *People v. Contreras* (2018) 4 Cal.5th 349, 382 [declining to consider whether disparate treatment of juvenile one strike offenders under the youthful offender statute violates principles of equal protection].) Our denial of relief at this time is without prejudice to the subsequent consideration of this issue.

Disposition

The order denying defendant's petition for resentencing is affirmed. Treating the appeal as a petition for writ of habeas corpus, the petition is denied without prejudice.

POLLAK, P. J.

WE CONCUR:

STREETER, J.
BROWN, J.